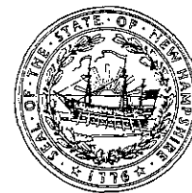




State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES

6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095
(603) 271-3503 FAX (603) 271-2867



M.L.& Sons Enterprises, Inc..
Attn: Mr. Paul Tashereau
9 Dick Tracy Drive
Pelham, NH 03076

Re: 41 Gingras Drive, Nashua, NH

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
No. AF 03-019**

July, 16, 2003

I. INTRODUCTION

This Notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Waste Management Division ("the Division") to M.L.& Sons Enterprises, Inc., ("M.L.& Sons") pursuant to RSA 149-M and Env-Wm 100-300, 2100 et seq. The Division is proposing that fines totaling \$2,000.00 be imposed against M.L.& Sons for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

II. PARTIES

1. The Department of Environmental Services, Waste Management Division, is an administrative agency of the State of New Hampshire, having its principal office at 6 Hazen Drive, Concord, NH.
2. M.L.& Sons Enterprises, Inc.. is a corporation registered to do business in New Hampshire having a mailing address of 9 Dick Tracy Drive, Pelham, NH 03076.

III. SUMMARY OF FACTS AND LAW SUPPORTING CLAIMS

1. Pursuant to RSA 141-E:3, II, the Department of Environmental Services ("DES") regulates the management of Asbestos Disposal Sites as defined by RSA 141-E:2, III. Pursuant to RSA 141-E:4, II, the Commissioner of DES has adopted Env-Wm 3900 to implement this program.
2. Pursuant to RSA 141-E:16, II, the Commissioner of DES is authorized to impose fines of up to \$2,000 per violation, for violations of RSA 141-E or rules adopted pursuant thereto pursuant to this section.
3. RSA 141-E:2, III, defines "Asbestos disposal site" in part as "land where asbestos waste exists, either in or on the ground, due to dumping activities which ceased by July 10, 1981."
4. 41 Gingras Drive is identified on the City of Nashua Tax Map 104 as lot 74 (the "Property"). Pursuant to RSA 141-E:2, III, the Property is an asbestos disposal site.

5. Pursuant to Env-Wm 3902.08, a "Major project" "means any activity at an asbestos disposal site, that involves the excavation, removal, exposure, or other disturbance of more than 160 square feet, which is approximately 15 square meters, or 35 cubic feet, which is approximately one cubic meter, of asbestos or any material mixed with or containing asbestos, where the total disturbance involved in a project is measured cumulatively."
6. Pursuant to Env-Wm 3906.02(a), "no person shall undertake a major non-emergency project except in accordance with a written work plan ("Work Plan") prepared and approved in accordance with this part".
7. Pursuant to Env-Wm 3906.02(a), the work conducted by M.L. & Sons Enterprises, Inc., at the Property, from approximately January 24, 2003 to February 7, 2003, required a DES approved Work Plan.
8. On January 23, 2003, DES received the Work Plan titled "Site Specific Work and Safety Plan" submitted by M.L. & Sons Enterprises, Inc.
9. Pursuant to Env-Wm 3906.06(c), DES approved the Work Plan on January 23, 2003.
10. Pursuant to Env-Wm 3906.04(c) and (l), Mr. Paul Taschereau, owner of M.L. & Sons Enterprises, Inc., signed the Work Plan, certifying that the work practices on the Property would be conducted in accordance with the Work Plan.
11. The Work Plan includes the following relevant work practice provisions:
 - a. Item 1: The Work Plan, "must be reviewed and followed by all personnel involved with this site work."
 - b. Item 4: "No unauthorized personnel will be allowed to enter the [exclusion zone]."
 - c. Item 6: "(3) Air monitoring devices will be set up daily along the perimeter of the [exclusion zone]"
 - d. Item 6: "HTE Northeast, Inc. 2 Cote Lane, Unit #1 Bedford, NH 03110. [...], will be responsible for the daily set up and collection of air monitoring stations as well as submission for analysis and reporting of the results."
 - e. Item 11: "During excavation, a light mist of water with calcium chloride will be sprayed on the equipment and over the trench area to assure that no fibers will become airborne."
 - f. Item 11: "Upon completion of the trenching, the sides of the trench shall be lined with poly to assure that asbestos on the trench side-walls does not migrate beyond the limits of the [exclusion zone]."
 - g. Item 12: "Prior to loading, all trucks will be lined with double ten-mill poly, using duct tape on seams and for closure of the load."

12. Pursuant to Env-Wm 3905.10(a), access control shall be provided.
13. Pursuant to Env-Wm 3905.10(b), access control shall include displaying a warning sign.
14. Pursuant to Env-Wm 3905.05(a), "The excavation, removal, exposure or other disturbance of asbestos at an asbestos disposal site shall be conducted in a manner that: Is protective of public health, safety, and the environment; and does not cause a release of asbestos fibers to the environment, including any release identified in Env-Wm 3904.02."
15. Pursuant to Env-Wm 3905.13, in part, air monitoring shall be provided in accordance with the approved Work Plan.
16. Pursuant to Env-Wm 3905.11(b), "Wet methods, or wetting agents, shall be used to prevent the airborne release of asbestos fibers during a major or minor project."
17. On Monday January 27, 2003, personnel from DES conducted an inspection of the Property. At the time of the inspection the asbestos disposal site work was idle and no asbestos disposal site workers working for M. L. & Sons Enterprises Inc. were on site. During the inspection the following was observed:
 - a. The excavation was not covered in accordance with the Work Plan.
 - b. Non-friable asbestos plate waste and friable asbestos bag-house waste were exposed in the excavation.
 - c. Site control was not in accordance with the Work Plan. Access to the excavation was not controlled. There were no warning signs present that identified the site as an asbestos disposal site project or that unauthorized persons should stay out.
 - b. A local resident was observed in the excavation portion of the exclusion zone.
18. On Monday January 29, 2003, DES personnel inspected the Property and observed the following:
 - a. Two air-monitoring stations were operating. The two stations were equipped with battery powered low volume pumps;
 - b. Two piles of soil were placed directly on unprotected pavement. The inspector observed material that appeared to be asbestos bag-house and plate waste in both piles;
 - c. There was no effort to mist the soil that was being disturbed or the soil being stored in the two piles; and
 - d. The site supervisor Mike Oliva, ADS Worker Certification # 0080, said he had not reviewed the Work Plan. When asked if he knew this was an asbestos disposal site project, he said yes, but before arriving at the site, he was only told that it was "an asbestos pipe job". He then stated that he "only realized it was an ADS project after seeing the asbestos waste in the soil".

19. On Thursday, January 30, 2003, DES personnel telephoned Charles E. Teale of HTE Northeast, Inc. During the conversation Mr. Teale stated that M.L. & Sons Enterprises, Inc. had arranged for their services on a "call when needed" basis. Mr. Teale also stated that HTE was not called back after the first day of service, Friday, January 24, 2003.

20. On Thursday, January 30, 2003, DES personnel inspected the Property and observed the following:

- a. Material being disturbed was not being misted; and
- b. The excavator was digging through an area that appeared to contain a deposit of bag-house waste. As the excavator dug, excavated material fell to the ground resulting in deposition of contaminated soil on unprotected ground adjacent to the excavation, and around and on the rear wheels of the truck that was being loaded with the contaminated soil.

IV. VIOLATIONS ALLEGED AND PROPOSED ADMINISTRATIVE FINE

1. M.L. & Sons Enterprises Inc. has violated Env-Wm 3906.02(a), by failing to conduct the asbestos disposal site project in accordance with the approved Work Plan. For the violation identified above, RSA 141-E:16 allows for a fine of up to \$2,000, for violations of RSA 141-E or rules adopted pursuant thereto.

The total fine being sought is \$2,000.

V. REQUIRED RESPONSE, OPPORTUNITY FOR HEARING

Pursuant to Env-C 601.06, you are required to respond to this notice. Please respond no later than August 16, 2003 using the enclosed colored form.

1. If M.L. & Sons would like to have a hearing, please sign the appearance section of the colored form and return it to the DES Legal Unit, as noted on the form. A Notice of Scheduled Hearing will be issued.

2. If M.L. & Sons chooses to waive the hearing and pay the proposed fine, please have the authorized representative sign the waiver (lower portion) and return it **with payment of the fine** to the DES Legal Unit.

3. If M.L. & Sons wishes to discuss the possibility of settling the case, please have the authorized representative sign the appearance and return it to the DES Legal Unit **and** call the DES Legal Unit to indicate M.L. & Sons 's interest in settling.

M.L. & Sons is not required to be represented by an attorney. If M.L. & Sons chooses to be represented by an attorney, the attorney must file an appearance and, if a hearing is held, submit proposed findings of fact to the person conducting the hearing.

VI. DETERMINATION OF LIABILITY FOR ADMINISTRATIVE FINES

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that M.L.& Sons committed the violations alleged and that the total amount of fines sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that M.L.& Sons committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

* Pursuant to Env-C 601.09(c), the fine will be reduced by 10% for each of the circumstance M.L. & Sons listed below that M.L. & Sons proves, by a preponderance of the evidence, applies in this case:

1. The violation was a one-time or non-continuing violation, **and** M.L.& Sons did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** M.L.& Sons did not benefit financially, whether directly or indirectly, from the violation.
2. At the time the violation was committed, M.L.& Sons was making a good faith effort to comply with the requirement that was violated.
3. M.L.& Sons has no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
4. Other information exists which is favorable to M.L.& Sons's case which was not known to the Division at the time the fine was proposed.

*****IMPORTANT NOTICE*****

An administrative fine hearing is a formal hearing. Any hearing will be tape recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that M.L.& Sons Enterprises, Inc.. committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is M.L.& Sons's opportunity to present testimony and evidence that M.L.& Sons did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If M.L.& Sons has any evidence, such as photographs, business records or other documents, that believes show that M.L.& Sons did not commit the violation(s) or that otherwise support M.L.& Sons's position, M.L.& Sons

should bring the evidence to the hearing. M.L.& Sons may also bring witnesses (other people) to the hearing to testify on M.L.& Sons's behalf.

If M.L.& Sons wishes to have an informal meeting to discuss the issues, M.L.& Sons must contact the DES Legal Unit at (603) 271-6072 to request a prehearing conference.

Information regarding this proposed fine may be made available to the public via the DES Web page (www.state.nh.us.des). If M.L.& Sons has any questions about this matter, please contact the DES Legal Unit, at (603) 271-6072.

COPY

Philip J. O'Brien, Ph.D., P.G., Director
Waste Management Division

Enclosure (NHDES Fact Sheet #CO-2002)

cc: Mark Harbaugh, DES Legal Unit
Susan Weiss Alexant, DES Hearings and Rules Attorney
Thomas Livingston, DES WMD
Richard Reed, DES, SWMB
David J. Rousseau, DES, SWCS

***** RETURN THIS PAGE ONLY *****

**M.L.& SONS ENTERPRISES, INC.,
IS REQUIRED BY LAW TO RESPOND TO THIS NOTICE.**

PLEASE RESPOND NO LATER THAN August 16, 2003

Please check the appropriate line and fill in the requested information below.

APPEARANCE On behalf of M.L.& Sons Enterprises, Inc..

_____ I request to have a **formal hearing** scheduled in this matter.

_____ I request to have a **prehearing conference** scheduled in this matter.

_____ I would like to **meet informally** to discuss the issues in this matter.

WAIVER OF HEARING On behalf of M.L.& Sons Enterprises, Inc..

_____ I certify that I understand the right to a hearing regarding the imposition of the proposed administrative fine and that I hereby waive those rights. The fine payment in the amount of \$2,000.00 paid to "Treasurer, State of New Hampshire" is enclosed.*

Pursuant to Env-C 203.05 please provide the following information:

Signature

Date

Name (please print or type): _____

Title: _____

Phone: _____

RETURN THIS PAGE ONLY TO:

Michael Sclafani, Legal Assistant

Department of Environmental Services ~ Legal Unit

6 Hazen Drive, P.O. Box 95

Concord, NH 03302-0095

** If payment is made by a check, draft, or money order that is returned due to insufficient funds, pursuant to NH RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the original check draft, or money order or \$25.00, whichever is greater, plus all protest and bank fees, in addition to collecting the amount of the original check draft, or money order.*